

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

CITY OF SPRINGFIELD, MISSOURI,)	
d/b/a CITY UTILITIES OF)	
SPRINGFIELD, MISSOURI,)	
)	
Petitioner,)	
)	
vs.)	Public Case No. UC 88-005
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL)	
UNION 753,)	
)	
Respondent.)	

JURISDICTIONAL STATEMENT

This case appears before the State Board of Mediation upon the filing by the City of Springfield, Missouri, d/b/a City Utilities of Springfield, Missouri (City Utilities), of a petition for clarification of a bargaining unit voluntarily recognized by City Utilities. The bargaining unit is represented by International Brotherhood of Electrical Workers, Local 753. City Utilities contends that seven employees classified as foremen are supervisors and therefore should be excluded from the appropriate bargaining unit. In contrast, Local 753 argues that an existing agreement between City Utilities and Local 753 makes the clarification petition untimely based on the contract bar rule. Should the supervisory question be reached, Local 753 alternatively contends that the foremen are not true supervisors and therefore should be included in the appropriate bargaining unit.

The State Board of Mediation is authorized to hear and decide the issues concerning appropriate bargaining units by virtue of Section 105.525, RSMo 1978. A hearing was held on October 21, 1987, in Springfield, Missouri, at which representatives of Local 753 and City Utilities were present. The case was heard by State Board of

Mediation Chairman Mary Gant, employer member Milton Talent, and employee member James O'Mara.

At the hearing, the parties were given full opportunity to present evidence. The Board, after a careful review of the evidence, sets forth the following findings of fact and conclusions of law.

FINDINGS OF FACT

City Utilities employs approximately 900 persons and serves the City of Springfield and its surrounding area by providing gas, electric, water and transportation services to the community. There exists a long and substantial bargaining history between the International Brotherhood of Electrical Workers and City Utilities. When the company was purchased by the city in 1945, City Utilities continued to voluntarily recognize a bargaining unit of employees represented by IBEW, Local 753. This voluntary recognition continues today in that the parties negotiated and entered into an agreement covering the customary terms and conditions of employment. The agreement -- referred to as the "Joint Statement of Intent" -- was effective July 15, 1985 and continues until July 15, 1988.

For the purpose of this decision, the Board must focus on the gas and water department which has approximately 97 employees. Seven employees in that department are classified as foremen who City Utilities argues are supervisors that should be excluded from the bargaining unit. Other employees in the gas and water department include those in the gas and water construction section. This section is responsible for the maintenance and operation of an 800-mile gas system throughout the city, servicing existing mains, constructing new mains, and repairing leaks. There are 44 employees in this group. There is one general foreman, one assistant general foreman, five foremen who are in dispute, two leak investigators, nine equipment operators, 21 servicemen and five welders.

In the gas measurement or meter department, there is one general foreman, one assistant general foreman, one foreman who is in dispute, one assistant foreman, four industrial servicemen and three metermen. In the gas and pressure control section there is one foreman who is in dispute, five pressure operators, five regulatormen and one welder.

Evidence concerning the duties and responsibilities of the foremen in the gas construction section was presented at the hearing. The parties stipulated that the foremen in the meter and pressure control sections have similar duties and responsibilities as the foremen in the gas construction section.

The gas construction foremen report directly to the general foreman within their section. At the end of each day, the foremen determine which jobs need to be done the next day. Major construction jobs emanate from the engineering department. The general foremen in turn will direct a foreman that a certain job needs to be completed. The foreman does all the preliminary investigation concerning the job, determining the size of crew and the type of employee needed to complete the project. The foreman completes a crew schedule and submits this list to the general foreman who relies heavily on the foreman's decisions. The next day when the job is to be done, the crew schedule may be revised by the general foreman in the event of absenteeism. Otherwise, the foreman's decisions concerning the size of crew and the type of employees needed is followed. Once at a job site the foreman may determine if additional employees are necessary. In such instances, the foreman radios that information to the general foreman who sends additional workers to the job site.

The foreman in the gas construction section can supervise up to three crews each. The crews can vary from one to three people. A typical crew is made up of a serviceman, a leadsman and an equipment operator. The foreman spends a substantial majority of his time in a non-working capacity. The Statement of Intent entered into by Local 753 and City Utilities specifically provides that the foremen are not allowed to do

bargaining unit work except in cases of emergency. Instead, the foreman oversees the work of his crews to ensure that the work is being done properly. Because the crews are located at different locations, the foreman must travel throughout the day to check on the progress of the various jobs. Unlike the foreman, the assistant general foreman and the general foreman do not routinely go to the job sites.

The foreman's role in hiring other employees is limited. The Statement of Intent establishes how bargaining unit positions are filled. In most cases when a new job becomes available, a notice of the opening is posted on a bulletin board to be viewed by other employees within the bargaining unit. All new employees are hired as probationary employees for the first six months. During that time the new employee is evaluated as to his work abilities. After five months on the job, a new employee is evaluated by the general foreman, the assistant general foreman and the regular foreman. If, based on these evaluations, the new employee is not working up to standards, the employee is given a one month period to rectify any problems. If during the final one month period the employee's performance improves, the probationary employee will be retained, otherwise the employee is terminated.

Promotions within the bargaining unit are also covered by the Joint Statement of Intent. Generally, those promotions are made on a seniority basis. However, the ability and qualifications of the employee are evaluated annually by the general foreman. The general foreman prepares the evaluation form and discusses it with the involved employee. However, since the general foreman does not work in the field as do the foreman in question, the general foreman must rely on information provided by the foreman.

There was little evidence presented concerning discipline of other employees by the foreman. However, the general procedure is that should a foreman have a problem with an employee, the foreman will bring the matter to the attention of the general

foreman who will make an independent investigation of whether the employee should be reprimanded.

The foremen are paid at an hourly rate of \$14.23. This rate is \$1.00 above an assistant foreman and higher than any other employee in the gas department except the assistant general foreman and general foreman.

CONCLUSIONS OF LAW

City Utilities has petitioned the Board to clarify an existing bargaining unit, seeking to exclude seven foremen who it alleges are supervisors. Local 753 argues that the petition must be dismissed because of the contract bar rule. Since 1945, City Utilities has voluntarily recognized Local 753 as the exclusive bargaining representative of a large number of employees of City Utilities, including the seven foremen in question. City Utilities and Local 753 negotiated and entered into an agreement covering the customary terms and conditions of employment. This agreement was effective July 15, 1985 and continues until July 15, 1988. Local 753 contends that because of the existing agreement a petition for clarification must be filed not earlier than 90 days nor later than 61 days before the termination date of the contract. A clarification petition, therefore, would be considered timely only if filed within the period commencing April 16, 1988 and ending on May 15, 1988.

Local 753 cites as controlling precedent concerning the contract bar-unit clarification petition issue this Board's ruling in IAFF, Local 2543 v. City of Poplar Bluff, Public Case No. 81-029 (SBM 1981). In that case, the Board ruled that a petition for clarification was untimely because of an existing agreement between the employer and the union if the employer (1) meets, confers, and discusses proposals concerning the customary terms and conditions of employment with the employee's bargaining representative, (2) reduces those discussions to writing, (3) presents such proposals to the appropriate governing body, and (4) governing body adopts those proposals. Despite the Board's ruling in Poplar Bluff, however, it is now clear that a rigid application

of the contract bar rule as set out in Poplar Bluff is no longer appropriate. A closer examination of NLRB decisions and the reasoning therein indicates that the contract bar rule should preclude unit clarification petitions only in certain circumstances. Given the particular facts of the instant case, the Board must rule that City Utilities clarification petition is timely filed.

City Utilities correctly points out that the contract bar rule applies generally only to petitions for certification and decertification. As outlined by City Utilities, the National Labor Relations Board and this Board apply the contract bar rule based on a concern for industrial stability. In applying the contract bar rule, the Board balances the competing interests of the employees' freedom of choice in selecting a bargaining representative and the stability of collective bargaining agreements between an employer and the employees' elected union. The same concern for industrial stability must be considered with not only certification and decertification petitions, but also with petitions for unit clarification.

Although decisions by the NLRB do not specifically refer to the contract bar rule, the NLRB does dismiss unit clarification petitions when filed during the existence of a valid contract agreement. However, the NLRB will entertain a clarification petition during the term of a valid agreement if the petition involves new positions, or the job duties of the employees have changed since the bargaining agreement was entered into. See, Crown Cork & Seal Co., Inc. 203 NLRB 29 (1973). In other NLRB cases that Board has dismissed clarification petitions finding that such a petition would be disruptive of the collective-bargaining relationship voluntarily entered into between the parties. As stated in Arthur C. Logan Memorial Hospital 231 NLRB 119 (1977) to permit the employer or union "to knowingly execute a contract and immediately thereafter petition the Board for clarification of that agreement to exclude covered classifications would tend to undermine the parties' collective-bargaining relationship." The danger of such disruption, however, is not present in the instant case given that the existing contract will

expire within the next few months. Had the clarification petition been filed earlier, the application of the contract bar may have been appropriate.

In view of the foregoing, the Board modifies its position as set out in Poplar Bluff, which held that a petition for clarification would be considered untimely if filed during the existence of a valid contract between the employer and union. Instead this Board will consider clarification petitions filed during the term of an existing contract if the petition involves other circumstances where the clarification would not be disruptive of the parties' collective-bargaining relationship. Accordingly, because the clarification petition has been filed so close to the expiration date of the existing contract, the Board finds that said petition is timely filed.

Before reaching the merits of City Utilities' petition the Board must address Local 753's contention that no evidence should have been allowed at the hearing concerning the duties of the foremen in question because of the parol evidence rule. Generally, administrative bodies are not required to follow common law and other technical rules of evidence while conducting a hearing. Instead, it is the duty of the Board to hear all evidence concerning the issues brought forth and to make a determination concerning any dispute regarding bargaining units. No authority was cited by Local 753 which would support its contention that the parol evidence rule is applicable to an administrative hearing. Accordingly, Local 753's argument concerning parol evidence is overruled.

Finally, the issue before the Board is whether the foremen in question are true supervisors and thus must be excluded from the appropriate bargaining unit. City Utilities contends that the foremen are true supervisors and therefore should be excluded from the bargaining unit. In contrast, Local 753 argues that the foremen lack the necessary authority to be considered true supervisors. For the reasons set out below, the Board holds that the foremen are in fact true supervisors and must be excluded from the bargaining unit.

An appropriate bargaining unit is defined by Section 105.500(1) RSMo 1978 as:

A unit of employees at any plant of installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned.

Missouri statutory law does not provide further guidelines for determining what constitutes a "clear and identifiable community of interest." However, the Board has consistently held that supervisors cannot be included in the same bargaining unit as the employees they supervise. St. Louis Fire Fighters Association, Local 73, v. City of St. Louis, Case No. 76-113 (SBM 1976); see, Golden Valley Memorial Hospital v. Missouri State Board of Mediation, 559 S.W.2d 581 (Mo.App. 1977).

In determining the supervisory status of employees within bargaining units, the Board has consistently examined the following factors:

- (1) The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees.
- (2) The authority to direct and assign the work force, including a consideration of the amount of independent judgment and discretion exercised in such matters.
- (3) The number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees.
- (4) The level of pay including an evaluation of whether the supervisor is paid for a skill or for supervision of employees.
- (5) Whether the supervisor is primarily supervising an activity or primarily supervising employees.
- (6) Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.

Based on the above factors, it is clear that the foremen in question are true supervisors. They have the authority to direct and assign the work force and are given a considerable amount of discretion in deciding which crews are necessary to complete the jobs. The foreman oversees up to three crews, sometimes supervising as many as

nine employees. Because the general foreman or the assistant general foreman are not present at the job site, there are no other employees at the job site that exercise greater authority over those employees than the foreman.

Also important in the Board's decision is that the foremen are unquestionably non-working supervisors. The record as a whole clearly indicates that the foremen are not allowed to perform the duties of their subordinate employees because of the contract existing between Local 753 and City Utilities. The Statement of Intent agreed upon by the parties provides that the supervisors shall not do the work of the employees included in the bargaining unit except in cases of an emergency. In view of the foregoing, the Board rules that the foremen are true supervisors who must be excluded from the appropriate bargaining unit.

DECISION

It is the decision of the State Board of Mediation that the seven employees classified as "foreman" in the gas and water department shall be excluded from the appropriate bargaining unit as being supervisory employees.

Signed this 11th day of February, 1988.

(SEAL)

STATE BOARD OF MEDIATION

/s/ Mary L. Gant
Mary L. Gant, Chairman

/s/ James O'Mara
James O'Mara, Employee Member

/s/ Milton Talent
Milton Talent, Employer Member